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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
DHS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 165 50832 Office: California Service Center Date: FEB 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the petition will be remanded for further action and consideration.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition and continuing.

On appeal, counsel submits additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor, and continuing. Here, the petition's filing date is April 30, 2001. The beneficiary's salary as stated on the labor certification is $85,000 per annum.

The petitioner initially submitted a copy of its 2000 Internal Revenue Service (IRS) Form 1120. In response to the director's request for evidence of June 12, 2002, the petitioner submitted its 2001 Form 1120 and the beneficiary's W-2 Wage and Tax Statement for 2001. The 2001 tax return showed a taxable income for the petitioner of -$90,917.

The director determined that the evidence did not establish that

the petitioner had the ability to pay the proffered wage, and denied the petition accordingly.

On appeal, counsel argues that the petitioner has the ability to pay the wage, presenting both new documentation and documentation previously submitted.

Counsel's argument is persuasive. The beneficiary's W-2 for 2001 shows that the petitioner paid him $82,421.53, a figure just $2,578.47 less than the proffered wage. The aforementioned Form 1120 for 2001 shows net current assets for the petitioner of $805,264. The difference to the beneficiary of $2,578.47 could have been made up from this source.

Accordingly, after a review of the record, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing.

Although not addressed by the director, a remaining issue to be examined is whether the beneficiary meets the educational requirements of the labor certification. The labor certification requires that the beneficiary have a "Bachelor's or equiv" with a major in "CS, Comp. App., Comp. Eng. MIS, Business or Commerce." There is nothing in the labor certification to indicate what "equiv" means. Consequently, it can only be assumed that it refers to a foreign equivalent degree, not to an equivalency based on a combination of education and/or experience.

The record shows that the beneficiary has a Bachelor of Commerce from the University of Madras which he was awarded in 1994 after three years of study. He also has an Advanced Diploma in Systems Management granted in 1994 by the National Institute of Information Technology, India. A credentials evaluation report, submitted with the petition, finds that the Bachelor of Commerce degree is the equivalent of three years of undergraduate study, and that the Advanced Diploma taken in conjunction with the Bachelor of Commerce degree is the equivalent of a Bachelor's degree in business administration and systems management from a regionally accredited institution in the United States.

The labor certification requires a "Bachelor's or equiv." Absent anything to the contrary, "equiv" is taken to mean a foreign equivalent degree. The beneficiary, then, falls under section 203(b)(3)(A)(ii) of the Act as a professional. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) specifies that: "If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree..."

Accordingly, this matter is remanded to the director for consideration under the above statutory provision and regulations at 8 C.F.R. § 204.5(l). The director must allow the petitioner the opportunity to submit any further evidence.

ORDER: The director's decision is withdrawn. The petition is

remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.